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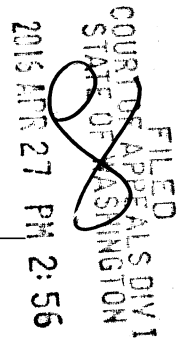

COURT OF APPEALS NO. 73827-5
SNOHOMISH COUNTY NO. 14-2-07754-6

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

D. RYAN PATRICK and RHONDA PATRICK, husband and wife,

Appellants,

v.

WELLS FARGO BANK, N.A., a national banking association; QUALITY LOAN SERVICE CORPORATION OF WASHINGTON, a Washington corporation; QUALITY LOAN SERVICE CORPORATION, a California corporation; MCCARTHY & HOLTHUS, LLP, a California law firm; and HSBC BANK, USA, N.A. AS TRUSTEE FOR WELLS FARGO ASSET-BACKED PASS-THROUGH CERTIFICATES SERIES 2007-AR8, a National Bank as Trustee for a New York common law trust,

Respondents.

APPELLANTS' REPLY BRIEF

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ORIGINAL

TABLE OF CONTENTS

TABLE OF AUTHORITY

Washington Cases

Federal Cases

Federal Statutes

State Statutes

Washington Constitution

Regulations

Other Authorities

I. REPLY ARGUMENT

This court has an opportunity to protect families from injury due to unfair or deceptive acts or practices suffered at the hands of historically one of the most powerful and trusted industries within society, the banking industry.

Wells Fargo and HSBC ("WF") thoroughly argued to the trial court, and to this court, how their acts are regulated by the Federal Trade Commission ("FTC") or the Consumer Financial Protection Bureau ("CFPB"). However, The FTC has no jurisdiction over banks. 15 U.S.C. § 46(a) ("excepting bank" from jurisdiction.) The CFPB also has no jurisdiction over banks.[1] 12 C.F.R. § 1014.1; 12 C.F.R. § 1015.1. (CFPB has the same "jurisdiction" as the FTC).[2]

Crucially, this court has an important opportunity cease the misrepresentations made by the financial industry before they have a chance to proliferate.

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[1] FTC disclaims power of both FTC and CFPB to regulate banks. *See* https://www.ftc.gov/news-events/media-resources/consumer-finance .

[2] If this is true, Wells Fargo and its Counsels' tactics seemingly violate RPC 3.3. If this court finds WF and its counsel misled the Trial Court, this Court, and Patrick's to believe this court should consider measures to eliminate these litigation tactics in the future, not just among these parties, but among all parties. *See e.g.* ***Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.,*** 122 Wn.2d 299, 356, 858 P.2d 1054, 1085 (1993) ("[S]anctions need to be severe enough to deter these attorneys and others from participating in this kind of conduct in the future.")

Finally, this court is presented with the opportunity to clarify how RCW 61.24.127 interacts with the Supreme Court's rulings in ***Frizzell v. Murray***, 179 Wn.2d 301, 313 P.3d 1171 (2013), ***Schroeder v. Excelsior Mgmt. Grp., LLC,*** 177 Wn.2d 94, 297 P.3d 677 (2013), and ***Klem v. Washington Mut. Bank,*** 176 Wn.2d 771, 295 P.3d 1179 (2013).

1. General Statutory Construction of the CPA

The CPA is to be construed "liberally." RCW 19.86.920. "Liberal construction" is a command that the coverage of an act's provisions in fact be liberally construed and that its exceptions be narrowly confined." ***Vogt v. Seattle-First Nat. Bank***, 117 Wn.2d 541, 552, 817 P.2d 1364, 1370 (1991) ***citing Nucleonics Alliance, Local Union 1–369 v. WPPSS,*** 101 Wn.2d 24, 29, 677 P.2d 108 (1984). Moreover, "the legislature [declared] that the purpose of this act is to complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition." RCW 19.86.920.

When ruling on the interaction of state law with the National Banking Act, the U.S. Supreme Court stated, "[u]ndoubtedly a state has the legitimate power to define and punish crimes by general laws applicable to all persons within its jurisdiction ... But it is without lawful power to make such special laws applicable to banks organized and operating under the

laws of the United States." [***Easton v. State of Iowa,*** 188 U.S. 220, 239, 23 S. Ct. 288, 293, 47 L. Ed. 452 (1903).] The CPA is a general law applicable to all persons and generally applicable to National Banks.

2. In Order for WF to be "Exempt" From Liability Under the CPA, a "Regulatory Body" Must "Specifically Permit" the Actions That Injured Mr. and Mrs. Patrick

Along with the rest of the CPA, RCW 19.86.170 was originally enacted in 1961. Laws of 1961, Ch. 16, § 17. The original language stated:

> Nothing in this act shall apply to actions or transactions otherwise permitted, prohibited or regulated under laws administered by the insurance commissioner of this state, the Washington public service commission, the federal power commission or any other regulatory body or officer acting under statutory authority of this state or the United States...

In 1974, RCW 19.86.170 was amended to create two categories of exemptions as well as several provisos:[3]

> Nothing in this act shall apply to [1] actions or transactions otherwise permitted, prohibited or regulated under laws administered by the insurance commissioner of this state, the Washington public service commission, the federal power commission or

[3] PROVIDED, HOWEVER, That actions and transactions prohibited or regulated under the laws administered by the insurance commissioner shall be subject to the provisions of RCW 19.86.020 and all sections of chapter 216, Laws of 1961 and chapter 19.86 RCW which provide for the implementation and enforcement of RCW 19.86.020 except that nothing required or permitted to be done pursuant to Title 48 RCW shall be construed to be a violation of RCW 19.86.020: PROVIDED, FURTHER, That actions or transactions specifically permitted within the statutory authority granted to any regulatory board or commission established within Title 18 RCW shall not be construed to be a violation of chapter 19.86 RCW: PROVIDED, FURTHER, That this chapter shall apply to actions and transactions in connection with the disposition of human remains.
RCW 9A.20.010(2) shall not be applicable to the terms of this chapter and no penalty or remedy shall result from a violation of this chapter except as expressly provided herein.

> [2] actions or transactions permitted by any other regulatory body or officer acting under statutory authority of this state or the United States...

Pre-1974, if an entity's actions were "permitted, prohibited or regulated under laws administered by... any other regulatory body or officer acting under statutory authority of ... the United States..." it was exempt from the CPA. ***Dick v. Attorney General of Washington,*** 83 Wn.2d 684, 521 P.2d 702 (1974); ***Vogt,*** 117 Wn.2d at 547-48.

The 1974 amendment left the analytical framework intact, but changed the law so that in order to be exempt an action needed to be "permitted" by a "regulatory body," instead of "permitted, prohibited or regulated." ***Dick***, 83 Wn.2d 684. (In ***Dick***, a Dr. undertook the unauthorized practice of medicine, an action prohibited by a licensing department. The court held that under the pre-1974 statute he was exempt from the CPA because his action was prohibited by a regulatory body.); Law of 1974 Ch. 158 § 1.

Vitally, "[o]nly those practices which are otherwise Permitted by a regulatory body escape Consumer Protection Act coverage. Practices which are Prohibited or Regulated by regulatory bodies may now be the subject of an action under the Consumer Protection Act." ***Kittilson v. Ford***, 23 Wn. App. 402, 410, 595 P.2d 944 (Div. III 1979) ***aff'd,*** 93 Wn.2d 223, 608 P.2d 264 (1980); ***Panag v. Farmers Ins. Co. of Washington***, 166 Wn.2d 27, 52, 204 P.3d 885 (2009); ***Vogt,*** 117 Wn.2d at 551;

Dick, 83 Wn.2d 684; ***Contra Miller v. U.S. Bank of Washington, N.A.,*** 72 Wn. App. 416, 865 P.2d 536 (1994).

Additionally, the Supreme Court does not read "the statute to exempt a transaction or action merely because the business or trade is regulated generally." ***Dick***, 83 Wn.2d at 688; ***Vogt***, 117 Wn.2d at 552.("RCW 19.86.170 does not exempt actions or transactions merely because they are regulated generally. The exemption applies only if the particular practice found to be unfair or deceptive is specifically permitted, prohibited or regulated.") (emphasis added); ***Contra Miller,*** 72 Wn. App. 416.

Accordingly, "although the Comptroller of the Currency has regulatory and supervisory authority over national banks, that authority alone does not result in exemption under the Consumer Protection Act." ***Vogt,*** 117 Wn.2d at 554. Congruent with ***Dick***, ***Vogt*** and ***Kittilson*** is the Supreme Court's recent statement, "[t]he CPA contains a "safe harbor" provision for any activity or transaction that is expressly permitted by any regulatory body." ***Panag***, 166 Wn.2d at 52 (emphasis added).

3. The Federal Trade Commission and the Consumer Financial Protection Bureau, Both of Which Lack Jurisdiction Over Banks, are not "Regulatory Bodies"

"The FTC is not a 'regulatory body' within the meaning of RCW 19.86.170." ***State v. Reader's Digest Ass'n, Inc.,*** 81 Wn.2d 259, 279-280, 501 P.2d 290 (1972).

Further, there is no evidence in the record that the Consumer Financial Protection Bureau ("CFPB") meets the definition of "regulatory body." ***See id.*** In fact, based upon 12 C.F.R. § 1014.1, which states "[t]his part applies to persons over which the Federal Trade Commission has jurisdiction under the Federal Trade Commission Act," the CFPB is exactly the same as the FTC and thus not a "regulatory body" under RCW 19.86.170. Moreover, the Office of the Comptroller of the Currency ("OCC") is not responsible for enforcing 12 C.F.R. § 1014.4, therefore it is not a "regulatory body."

4. Wells Fargo and HSBC's ("WF") Unfair or Deceptive Actions That Are Not Exempt From the CPA Because They are not "Permitted" by a "Regulatory Body or Officer" of the "United States"

WF argues it is above the law and it should not be responsible for: (1) instructing the Patricks to miss payments in order to get a loan modification that would be financially beneficial and then did not provide a loan modification (CP 2780 at ¶ 6; CP 3 at ¶¶ 8-9); (2) proceeding with selling the Patrick's home while at the same time reviewing them for a loan modification (CP 2172-2187,CP 2223-2225, 2238-39); (3) not providing the Patricks with the material fact that it had no power to modify the Patrick's loan while continually requesting modification packet materials (CP 2160, 2215); and, (4) communicating misleading information and omitted material information from homeowners during the loan modification and fore-

closure process. (CP 1-10; CP 2922-2927)

5. WF Concedes Patricks' Arguments Regarding 12 C.F.R. § 1015 Are Correct

WF argued it was exempt under Washington's CPA because its actions were prohibited under 12 C.F.R. § 1015, specifically 12 C.F.R. § 1015.3. CP 2902:4-17. In response, the Patricks laid out why WF is not exempt under 12 C.F.R. § 1015. CP 2824:3-2826:2; Opening Brief at 42-44. Now, in response to the Opening Brief, WF claims to be exempt under 12 C.F.R. §1014.3. Wells Fargo and HSBC's Brief ("WF Brief") at 36-37. By not addressing 12 C.F.R. §1015 in its brief, WF concedes the Patricks arguments regarding its inapplicability. *See generally id.*

6. WF Argues for the First Time in its Response Brief That it is Exempt From Liability Under the CPA Because 12 C.F.R. § 1014.3 Prohibits its Actions

WF's claim, which it raises for the first time on appeal, is that it is exempt from the CPA because 12 C.F.R. § 1014.3 prohibits advertising that makes material misrepresentations regarding "the consumer's ability or likelihood to obtain a refinancing or modification of any mortgage credit product or term." 12 C.F.R. § 1014.3 (r). WF Brief at 36-37.

As discussed above, this argument is fatally flawed because there is 42 years of Supreme Court Precedent which clearly states a "regulatory body" must "specifcally permit" "actions or transactions" in order for the

actor to be "exempt" from liability under the CPA. *See supra*. Here, the regulation "prohibits" WF's conduct, and the entities responsible for enforcing the regulation, the FTC and the CFBP, are not "regulatory bod[ies]" under the CPA. Additionally, both holders are without jurisdiction.

7. No Regulatory Body or Agency has Primary Jurisdiction

As stated above, no agency has jurisdiction over this dispute.

Assuming an agency has jurisdiction, when both a court and an agency have jurisdiction over a matter, the doctrine of primary jurisdiction determines whether the court or the agency should make the initial decision. ***Vogt***, 117 Wn.2d at 554 (citing ***see Nader v. Allegheny Airlines, Inc.***, 426 U.S. 290, 96 S.Ct. 1978, 48 L.Ed.2d 643 (1976); Berendt & Kendall, *Administrative Law: Judicial Review—Reflections on the Proper Relationship Between Courts and Agencies,* 58 Chi.[–]Kent L.Rev. at 215, (1981–1982)).

In this case, there is no private right of action under the Federal Trade Commission Act, 15 U.S.C. §§ 41-58, as amended. ***Holloway v. Bristol-Myers Corp.,*** 485 F.2d 986, 1002 (D.C. Cir. 1973). The Dodd Frank Wall Street Reform Act also provides no language establishing a private right of action. ***See generally*** 12 U.S.C. §§ 5531 and 5536. Moreover, 12 C.F.R. §

1014.1-.7 does not contain language granting a private right of action. Further, 12 C.F.R. § 1014.6 only authorizes an "attorney general" or "other officer of the state" to bring an action pursuant to section 626(b) of the 2009 Omnibus Appropriations Act. When taken together the inference is there is no private right of act under 12 C.F.R. § 1014 and WF has put forth no evidence to the contrary.

Further, no entity has "the authority to award attorneys' fees and treble damages, but such an award is available under the Consumer Protection Act." ***Vogt***, 117 Wn.2d 541 at 555.

In conclusion, only the Washington Courts have jurisdiction over this dispute between WF and the Patricks because no agency has the authority to make an initial decision regarding the dispute between WF and Patrick.

8. The CPA is Not Preempted by Federal Law.

Even though WF has never argued the CPA is preempted, the cases that discuss exemption under RCW 19.86.170 occasionally use the terms "exempted" and "preempted" interchangeably, even though they are distinct legal concepts with different analyses.

> In determining whether state laws are preempted, this court in *Detonics ".45" Assocs. v. Bank of Cal.* adopted the language of a United States Supreme Court case, *Hines v. Davidowitz.*[4] The test articulated was whether under the circumstances of a particu-

[4] ***Detonics .45 Associates v. Bank of California,*** 97 Wn.2d 351, 355, 644 P.2d 1170 (1982) (citing ***Hines v. Davidowitz,*** 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941)).

> lar case, state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[5] A national bank is subject to state law unless that law interferes with the purposes of its creation, or destroys its efficiency, or is in conflict with some paramount federal law.[6] In *Detonics,* this court concluded that there was no conflict between the National Bank Act and the relevant Consumer Protection Act section providing for attorneys' fees and costs in usurious transactions. The court reasoned that the statutory allowance of attorneys' fees in that case did not in any manner jeopardize the national banking system.

Vogt,, 117 Wn.2d at 553 (footnotes original, numbers changed). WF cites no federal law that is applicable here and holding WF responsible for its actions in no way jeopardizes the banking system.

9. Miller[7] is Inapposite to This Case.

WF takes issue that the Patrick's did not discuss ***Miller*** in more detail, but ***Miller*** is not applicable to this case because: 1) ***Miller*** was decided in 1991 and as discussed in Patrick's Opening Brief and WF's Brief the law has changed significantly since then; 2) ***Miller*** uses the word "preemption" in describing the Miller's contention the court incorrectly found the Bank was "exempt" from the CPA;[8] 3) ***Miller*** improperly applied RCW 19.86.170;[9] 4) ***Miller*** does not conduct any analysis of CPA exemption as

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[5] ***Detonics,*** 97 Wn.2d at 355.
[6] ***Detonics,*** 97 Wn.2d at 355 (citing ***Lewis v. Fidelity & Deposit Co.,*** 292 U.S. 559, 54 S.Ct. 848, 78 L.Ed. 1425, 92 A.L.R. 794 (1934)).
[7] ***Miller,*** 72 Wn. App. 416.
[8] ***Miller***, 72 Wn. App. at 419, as corrected (Feb. 22, 1994).
[9] ***Id***. at 420.

set out by the Supreme Court in ***Dick*** and and affirmed in ***Vogt***;[10] 6) Miller is in direct conflict with ***Kittilson***;[11] 5) ***Miller*** fails to recognize Supreme Court precedent acknowledging the FTC is not a regulatory body;[12] 6) ***Miller***

does not conduct a "preemption" analysis set forth in ***Detonics***;[13] 7) ***Miller*** does not discuss the discretionary nature of the primary jurisdiction doctrine; 8) ***Miller*** does not discuss that the fundamental requirement of primary jurisdiction is that the agency be able to offer a remedy to the parties and the FTC and the Comptroller cannot do so; and, 9) ***Miller*** ignores the fact that the FTC does not have jurisdiction over Banks.[14]

The ***Miller*** court, when faced with the Miller's contention that a bank was not "exempt" from the CPA, conducted a "primary jurisdiction" analysis, and found the FTCA "preempted" the CPA. ***Id***. at 422.

Importantly, Courts have a difficult job. They must decide issues within the purview of very complicated areas of law, of which this case and the ***Miller*** case fit. Courts are reliant on the Parties to present the law and facts accurately, as well as to make the appropriate legal arguments for each case. Perhaps, the parties in ***Miller*** failed to adequately brief the history of

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[10] ***Id.*** at 419
[11] ***Kittilson***, 23 Wn. App. at 410.
[12] ***Reader's Digest Ass'n, Inc.,*** 81 Wn.2d at 279.
[13] ***Detonics,*** 97 Wn.2d at 355
[14] For points 7, 8, and 9 ***see generally Miller,*** 72 Wn. App. 416

RCW 19.86.170 by addressing the distinctions between CPA exemption, preemption, and the doctrine of primary jurisdiction, or address jurisdiction of the FTC.

10. The Patricks' did not Waive Their Claims for Damages

a. Claims That Fall Outside the DTA are not Subject to Waiver

The Washington Supreme Court has continually held claims for damages that have arisen outside the DTA are not waived; yet, WF argues to the contrary. WF Brief at 14-15. Tellingly, the other Respondents don't make this argument and only argue the Patricks waive their objection to the sale. Quality Loan Services Corp of Washington (QLSWA) & McCarthy & Holthus (M&H) Brief ("Trustee Brief") at 11. The Supreme Court in ***Frizell*** stated, "The language of the statute provides that failure to bring a lawsuit to restrain a sale may result in a waiver of grounds that may be raised for invalidating the sale, not for other distinct damage claims." ***Frizzell,*** 179 Wn.2d at 310.

The Patricks suffered injury and were damaged significantly by WF's unreasonableness in reviewing the Patricks for a modification after telling the Patricks to miss payments. CP 2-5 ¶¶8-15, CP 7-10 ¶¶20-27. WF concealed material information from the Patricks throughout the modification process and continually put the Patricks in a worsened financial and emotional state. *Id.* These actions occurred prior and separate from any pro-

ceeding WF subsequently initiated against the Patricks under the DTA. *Compare* CP 7 ¶21 (the Patricks began discussing loan modification with WF in 2009) *with* CP 2922-2927 (Notice of Default issued November 19, 2013).

b. Waiver Does not Apply to Claims for Damages Related to Claims not Arising out of the Nonjudicial Foreclosure

Additionally, ***Frizzell's*** affirmation of ***Schroeder*** and ***Klem***, highlight the Supreme Court's intent that these cases remain good law in regards to the interplay between the DTA, waiver under RCW 61.24.127, and claims for damages. ***Frizzell,*** 179 Wn.2d at 310. (citing ***Schroeder,*** 177 Wn. 2d at 113-14; ***Klem,*** 176 Wn.2d at 796). Both ***Schroeder*** and ***Klem*** rejected the very argument WF is making here:

> Again, the respondents appear to claim Schroeder's failure to successfully avail himself of presale remedies extinguish or render moot all his claims for damages. **We find no support in the law for the idea that the failure to enjoin a sale somehow extinguishes other claims, causes of actions, or remedies available to parties to a real estate transaction or deed of trust.** As we noted recently, " **waiver only applies to actions to vacate the sale and not to damages actions.**"

Schroeder, 177 Wn.2d at 113-14 (quoting ***Klem***, 176 Wn.2d at 796) (emphasis added). In light of this statement, WF's argument that, "***Schroeder*** and ***Klem*** similarly do not support the assertion that claims for damages are immune from DTA waiver" is unpersuasive. WF Brief at 15.

Additionally, Respondents attempt to support their tenuous proposition with citation to non-controlling and unpersuasive federal district court cases[15] and the Div. III case, ***Merry v. Northwest Trustee Services, Inc.***, 188 Wn. App 174, 352 P.3d 830 (Div. III 2015). WF Brief at 14. However, nowhere in ***Merry*** does Div. III include any discussion of whether waiver applies to claims for damages such as negligence, intentional infliction of emotional distress, criminal profiteering, and etc., as raised here by the Patricks. ***See generally Merry***, 188 Wn. App 174. Div. III only discussed the application of waiver to the Plaintiff's claim for declaratory judgment regarding validity of the sale and Div. III explicitly pointed out that the Plaintiff was not claiming he was harmed. ***Id.*** at 176-77, 180. Accordingly, ***Merry*** is not helpful here.

c. Waiver Does not Apply Where the Sale is Void.

In addition to the inapplicability of waiver to the Patricks claims for damages, waiver does not apply to any of the Patricks claims because the Trustee Defendants actions were unlawful under the DTA making the sale void, not voidable. ***Schroeder,*** 177 Wn.2d 94; ***See Bavand v. OneWest***

[15]While this Court may find some of the federal authority cited by WF interesting, it cannot simply rely on a federal decision unless it provides a plain statement of independent state grounds in its judgment or opinion. ***See State v. Chrisman***, 100 Wn.2d 814, 817, 676 P.2d 419 (1984)(a plain statement of independent state grounds "advances the principles of federalism and comity between federal and state government which inherent in our system[;]" and, "[a] plain statement of independent state grounds is said to foster the development of state law free from federal interference"); ***see also, State v. Chenoweth***, 160 Wn.2d 454, 470-71, 158 P.3d 595 (2007).

Bank, FSB, 176 Wn. App. 475, 492, 309 P.2d 636 (Div. I 2013) ("Even where a party fails to timely enjoin a trustee's sale under RCW 61.24.130, if a trustee's actions are unlawful, the sale is void.") (citing ***Cox v. Helenius***, 103 Wn.2d 383, 693 P.2d 683 (1985); ***Schroeder,*** 177 Wn.2d at 107.

A borrower cannot waive violations of the DTA because they are limits on the Trustee's power to nonjudicially foreclose. ***Schroeder***, 177 Wn.2d at 107. ***Schroeder*** is not inapposite, as argued by WF, simply because the Plaintiffs in ***Schroeder*** and the Patricks are claiming different DTA violations. Both cases deal with violations of requisites to sale. Both the Defendants in ***Schroeder*** and WF argue the borrower waived their right to contest the sale because they failed to successfully enjoin it. ***Id***. at 111; *See* WF Brief at 17. However, waiver cannot apply when the requisites to selling the Patricks' home were not met. ***Id***. When the Respondents violated RCW 61.24.010(3)-(4) and 61.24.030(3), they lacked the lawful authority to proceed and as such their action cannot be waived by contract or by statute. ***Schroeder***, 177 Wn.2d 94 n. 13 citing Wash Const. art. IV, § 6; 15 Karl B. Tegland, Washington Practice: Civil Procedure § 44:6, at 239 (2009) ("an action to challenge a foreclosure sale may sound in equity and superior court have original, concurrent jurisdiction over all cases in equity.") By selling the Patricks home, Respondents flouted the

statutory limitations placed upon them.

d. Elements of Waiver are not met

WF inaccurately states the elements of waiver are uncontested. WF Brief at 9. The Patricks contested the elements of waiver. Opening Brief at 68; CP 2818:14-2821:12. Additionally, any analysis of whether waiver should be applied is moot when the trustee violates the DTA, as a trustees adherence to the DTA is a necessary condition of any waiver application. **See *Frizzell***, 179 Wn.2d at 310; ***Schroeder,*** 177 Wn.2d at 107; ***Cox***, 103 Wn.2d 383; ***Bavand,*** 176 Wn. App. at 492. In ***Frizzell***, the court would not invalidate the sale but the court was very careful to include a direction to the trial court to consider the ***Schroeder*** case on remand. ***Id***. This is because if the sale was void under ***Schroeder*** it simply cannot stand, and would be erroneous to apply waiver based on the DTA.

As discussed at length in their Opening Brief, the Patricks did not intentionally and voluntarily relinquish the right to their property; but sued the parties responsible for the unlawful foreclosure before the sale occurred and expressly invoked this Court's equitable jurisdiction to stop the trustee's sale because the Defendants did not have authority under the DTA. CP 837-929 at ¶ 4.25; *see also* ***Schroeder,*** 177 Wn.2d at 113 n.13.

11. The Court Erred in Granting Summary Judgment on The Patricks' CPA Claims Against Respondents

a. The Statute of Frauds has not Been Previously Raised and is Inapplicable

Trustee Respondents argue the statute of Frauds bars the Patricks' claims that WF promised them a loan modification. Trustee's Brief at 5. However, Respondents did not move for summary judgment on this issue and only cursory referenced it in their reply, making it an issue improperly raised by the Trustee here. CP 2867-2875; ***White v. Kent Medical Center, Inc.***, 61 Wn. App. 163, 168, 810 P.2d 4 (Div. I 1991) (Allowing the moving part to raise new issues in its rebuttal materials is improper because the nonmoving party has no opportunity to respond.)

Furthermore, the statute of fraud is not applicable because the Patricks are not seeking to enforce a modification agreement, but are seeking damages under the CPA, DTA, and negligence. ***See Sherwood B. Korssjoen, Inc. v. Heiman***, 52 Wn. App. 843, 852, 765 P.2d 301 (Div. I 1988) (The statute of frauds should not be applied to cases that are not squarely within its terms.)

b. WF's Claim That the Patricks' CPA Claim is Time Barred has not Been Previously Raised and is Inapplicable.

Likewise, WF did not move for summary judgment regarding a statute of limitations defense and are therefore barred from raising it in a reply, or here, for the first time. CP 2891-2907. ***White***, 61 Wn. App. at 168.

c. Unfair or Deceptive Action by WF

WF's brief is a blatant attempt to blame the Patricks for WF's unfair or deceptive conduct by repeatedly mischaracterizing the facts as the Patricks trying to get a "better deal." WF Brief at 1, 17, 22, 24, 30. Essentially, WF is attempting to obfuscate the elements of a CPA claim by claiming they did not act unfair or deceptive because they now believe the Patricks reasons for seeking a loan modification were frivolous. *Id.* The Patricks sought a loan modification because Mr. Patrick was a real estate broker whose business had been negatively impacted by the cratering housing market, which caused a drastic reduction in their family's income. CP 2 at ¶¶ 4-5. Additionally, the Patricks inquired about a loan modification with WF because the value of the home dropped significantly. CP 2-3 at ¶¶ 4-7. While current on his mortgage, Mr. Patrick worried about the change in his financial circumstances. *Id.* These very real problems prompted the Patricks to inquire with WF about a modification, this was not frivolous.

Additionally, WF argues Mr. Patrick was not entitled to a modification because he "purposefully defaulted." WF Brief at 5. There was no default, they were told to miss payments. Yet, WF's internal procedures corroborate Mr. Patricks' testimony that WF instructed the Patricks to miss their payments in order to qualify for a loan modification. *Compare* CP 3 ¶¶ at 8-9 (WF twice told the Patricks to miss payments) with CP 2156-2157; CP

2240-2246, CP 2297-2303 (WF will only consider borrowers for modification who have defaulted or are in imminent threat of defaulting). Importantly, the Patricks believed WF was both the owner and servicer of their note so it was reasonably foreseeable that the Patricks would rely upon the information WF was giving them, as the party with all the control and information over their loan. CP 10 ¶ 26. WF's arguments ignore the fundamental crux of its unfair or deceptive acts, WF was actively counseling the Patricks, throughout this process, only to leave the Patricks in financial ruin while stripping their family of their home. CP 1-10. After instructing the Patricks to default, WF sent the Patricks loan modification packets that WF is now attempting to use against the Patricks. CP 1-10; CP 27-35; CP 2172-2181. By that point, the Patricks were at the mercy of WF because in order to keep their home, and the Patricks were instructed by WF to complete and return the standard forms. *Id.* CP 27-35 (Had to sign documents sent by WF as they were written); CP 2172-2181 (The applications WF sent the Patricks required them to complete a Hardship affidavit and sign an acknowledgment/agreement.) WF acts unfairly or deceptively in telling borrowers to not make their payment and then sending out a form after the fact that they require the borrower to sign without making any alterations that has form language which states they did not purposefully default.

Additionally, the Patricks were never given all the information, such that there was an investor or owner of their loan, who could ultimately deny them. CP 1-10; CP 2160. The Patricks believed they were dealing with the owner of their loan, WF, when they followed WF's advice and missed their payments in order to get a loan modification. CP 1-10. However, in a letter dated July 23, 2012, WF first told the Patricks that there was an investor on the loan, who refused to modify. CP 2160. This was material information WF failed to provide to the Patricks while instructing them to miss payments in order to qualify for a loan modification. *See* CP 1-10.

Adding to the confusion, WF continued to send the Patricks solicitations for loan modifications. CP 2172-2187 (Letter dated November 9, 2012 detailing what the Patricks would need to send to be reviewed); CP 2223-2225 (Letter Dated January 17, 2013 requesting documents to review for modification) CP 2238-39 (request for additional information to be considered for HAMP). Then in a letter dated January 16, 2013, WF stated to the Patricks, "We do not have the contractual authority to modify your loan under HAMP because of limitations in our servicing agreement." CP 2215. WF was the Patricks' sole contact and the entity who told them to miss payment to qualify, yet they failed to tell the Patricks they had no power to actually provide the modification. This is what WF fails to address, this is an unfair or deceptive act. Telling a borrower to miss

payments without providing accurate information. The record at summary judgment established that WF mislead the Patricks.

d. Unfair or Deceptive Action by Trustee Respondents Violated Their Duty of Good Faith

The Patricks had a right to have a neutral trustee. RCW 61.24.010(4); ***Lyons v. U.S. Bank, N.A.***, 181 Wn.2d 775, 786, 336 P.3d 1142 (2015). Instead, their home was sold at the direction of an attorney, Robert McDonald, who represented both WF, the purported beneficiary, and QLSWA, the trustee. CP 810 (Mr. McDonald represented WF at mediation against the Patricks in 2014); CP 1903-04 (Mr. McDonald responded to the Patricks request to postpone the sale in a letter dated December 17, 2014) Mr. McDonald owed ethical duties to both WF and QLSWA, which violated the legal duty he had to be a neutral judicial substitute when acting as the representative of the trustee.

The facts in the record contradict Trustee Defendants assertion as they show that Mr. McDonald was listed as an attorney for M&H on its letterhead on May 14, 2015. CP 1037-41; Trustee Brief at 8-9.

Equally unpersuasive, is the trustee defendants argument that "the trustee is not the adjudicator of equitable defenses, the superior court is." Trustee Brief at 6. A trustee acting under the authority of the DTA does have a duty to adjudicate issues related to the nonjudicial foreclosure, in-

cluding whether the sale is properly conducted in order to adhere to its duty of good faith under RCW 61.24.010(4). ***Trujillo v. Northwest Trustee Services, Inc.***, 183 Wn.2d 820, 355 P.3d 1100 (2015) (citing ***Lyons***, 181 Wn.2d at 787) ("This duty "requires the trustee to remain impartial and protect the interests of all the parties.") The Trustee's duty to protect the interest of each party is codified, in part, in RCW 61.24.050, which explicitly gives a Trustee the power to void a trustee's sale and deed if it finds an error with the foreclosure. Additionally, "a trustee must treat both sides equally and investigate possible issues using its independent judgment to adhere to its duty of good faith." ***Lyons***, 181 Wn.2d at 787. Accordingly, the Trustee Defendants were required to investigate and use its independent judgment to adjudicate the Patricks claims before selling the Patricks home. ***Id***.

e. Trustee's Fees and Costs

Instead of addressing the substance of the Patricks claims that it was unfair or deceptive for Trustee Defendants to charge unrelated fees dated three years before being referred the nonjudicial foreclosure, Trustee Defendants argue that because the Patricks did not pay the fee's charged, the Patricks, "are in no position to complain about them." Trustee Brief at 7; *Compare* CP 1756-65; CP 1196-97 (Appointment recorded on Sept. 20,

2013) with CP 1764 (Charges from 2010). However, the Patricks were injured by this unlawful debt collection. ***See Frias v. Asset Foreclosure Servs.***, 181 Wn.2d 412, 441, 334 P.3d 529 (2014)(citing ***Panag***, 166 Wn.2d at 55-56 & n. 13. Respondents threatened to sell the Patricks' home, and did sell the Patricks' home, because the Patricks would not pay these improper fees. CP 1445 -1448, 1764, 1766-68.

f. Public Interest

Respondents argue, "the Patricks failed to submit any evidence whatsoever to show that their private interactions with WF injured others in the exact same fashion." WF Brief at 30. However, this is not the correct standard and the Patricks do not have to make a showing that WF injured others in the exact same fashion to meet the public interest element. *See* RCW 19.86.093; WPI 310.05(withdrawn); WPI 310.04. The Patricks simply must show the unfair or deceptive action has, or had, the capacity to injure others. *Id.*

The Patricks met this standard by showing their dealings with WF were conducted by WF in accordance with WF's standardized process. CP 2156-2157; CP 2240-2246, CP 2297-230. The Patricks put into evidence WF's internal guidelines that show WF had a process and prescribed set of guidelines for how and when it would extend modifications, which the Patricks modification was ultimately subject to. *Id.* WF required borrow-

ers be "in Default or Default Imminent" and advised the Patricks to miss their payments to qualify. *Compare* CP 3 ¶¶ at 8-9 (WF twice told the Patricks to miss payments) with CP 2156-2157; CP 2240-2246, CP 2297-2303 (internal guidelines require a default or imminent default). Accordingly, the situation is not unique to the Patricks.

Additionally, the Patricks put in uncontested evidence[16] regarding the 2010 assurance of discontinuance, which WF claims does not establish that it relates to any Washington Residents. WF Brief at 31. An unreasonable argument when the assurance was entered into between WF and the Washington State Attorney General. [17]

g. Injury & Proximate Cause

An injury to property occurs when:

> one's right to possess, use, or enjoy a determinate thing has been affected in the slightest degree. *Ambach v. French,* 167 Wn.2d 167, 172, 216 P.3d 405 (2009). A sufficient injury is therefore pleaded if a plaintiff alleges that she was deprived of the use of her property for even a short amount of time. *Sorrel v. Eagle Healthcare, Inc.,* 110 Wn. App. 290, 298–99, 38 P.3d 1024, *review denied,* 147 Wn.2d 1016, 56 P.3d 992 (2002);

Handlin v. On-Site Manager Inc., 187 Wn. App. 841, 849-50, 351 P.3d

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[16] Respondents did not contest the admissibility of this document at the Trial Court. *See* CP 794-795.

[17] *See* Press Release, Washington State Office of the Attorney General, Attorney General McKenna announces mortgage payment help for Wachovia and World Savings Bank borrowers (October 06, 2010), available at http://www.atg.wa.gov/news/news-releases/attorney-general-mckenna-announces-mortgage-payment-help-wachovia-and-world, last visited May 15,2015.

226, 230 (Div. I 2015).

Moreover, the Supreme Court has distinguished between the terms "injury" and "damages." ***Mason v. Mortgage Am., Inc.***, 114 Wn.2d 842, 854, 792 P.2d 142, 148 (1990) "This distinction makes it clear that no monetary damages are need be proven, and that nonquantitative injuries, such as loss of goodwill would suffice for this element of the Hangman Ridge Test." ***Id.*** Injury also includes the costs of investigation and the time needed to conduct the investigation in response to a misleading communication. ***Panag***, 166 Wn.2d at 40, 57–65.

The Patrick have non-litigation injuries that the Respondents ignore. The Defendants sold the Patricks' home. CP 2949-51. That is a CPA injury. ***Frias***, 181 Wn.2d at 431. The Patricks spent considerable time and money filling out paperwork, calling WF, and mailing and faxing requested documentation at WF's behest. ***Moritz v. Daniel N. Gordon, P.C.***, 895 F. Supp. 2d 1097, 1115 (W.D. Wash. 2012) ($7.75 postage charge sufficient for a CPA injury); see also ***Panag***, 166 Wn.2d at 63 (money spent on postage was an injury); CP 2779 at ¶ 5 and CP 8 at ¶ 22. Mrs. Patrick was forced to investigate possible reasons for this. CP 2781 at ¶ 11. Mrs. Patrick was unable to continue working because of WF's actions. CP 2781-2782 at ¶ 12. WF has caused Mr. Patrick to suffer professional harm as a real estate broker. CP 8 at ¶ 22.

Failure to provide the Patricks with their statutory and legal rights was an injury compensable under the CPA because Ch. 61.24 RCW creates property rights possessed by the Patricks. ***Handlin***, 187 Wn. App. at 849-50 (disclosures mandated by statute are a form of property.)

Finally, to succeed on their CPA claim, the Patricks need not show the Respondent's conduct was the sole proximate cause of their injuries, only that it was a proximate cause. WPI 310.07 (""Proximate cause" means a cause which in direct sequence produces the injury complained of and without which such injury would not have happened." ... "There may be one or more proximate causes of an injury") (emphasis added).

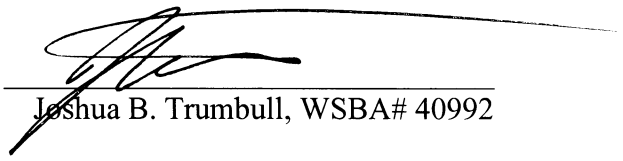
12. M&H is Liable for Acting as a Trustee

M&H's liability is not derivative of their business relationship with QLSWA, but instead arises from their direct action in undertaking the role of a trustee. *See e.g.* ***In Re Disciplinary Proceedings Against Droke***r, 59 Wn.2d 707, 719, 370 P.2d 242 (1962) (attorneys liable for aiding a separate company in unauthorized practice of law); CP 2107-2109; CP 1794 (M&H actively participated in nonjudicial foreclosure and charged the Patricks fees).

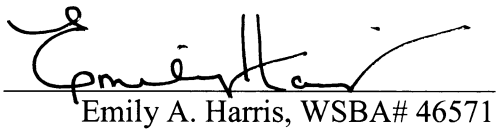
DATED this 27th day of April, 2016 at Arlington, Washington.

Respectfully Submitted By:

JBT & Associates, P.S.



Joshua B. Trumbull, WSBA# 40992



Emily A. Harris, WSBA# 46571

CERTIFICATE OF SERVICE

I, Ashley Brogan, certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct:

1. At all times hereinafter mentioned I am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to be a witness herein.

2. That on the 27th day of April, 2016, I caused to be served a true and correct copy of Appellants' Reply Brief to Respondents in the above title matter by causing it to be delivered to:

Joseph Ward McIntosh McCarthy & Holthus, LLP 108 1st Ave S, Suite 300 Seattle, WA 98104 jmcintosh@mccarthyholthus.com	☐Facsimile ☐Express Mail ✓ U.S. First Class Mail ☐Hand Delivery ☐Legal Messenger ✓ Electronic-Email
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DATED this 27th day of April, 2016 at Arlington, Washington.

Ashley Brogan

Ashley Brogan
Paralegal